1968

Beehive State Bank v. Deon Rosquist, Geraldine Rosquist and Ila R. Painter, Individuals, and Carpets, Inc. : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

BEEHIVE STATE BANK,
a corporation,
Plaintiff - Appellant,

— vs. —

DEON ROSQUIST, GERALDINE ROSQUIST and ILA R. PAINTER, Individuals, and CARPETS, INC., a corporation,
Defendants,

FIRST SECURITY BANK OF UTAH, N.A., a corporation,
Garnishee,

FRED L. PAINTER,
Intervener - Respondent.

Case No. 11053

APPELLANT'S BRIEF

Appeal From the Judgment of the Third District Court,
in and for Salt Lake County
HONORABLE STEWART M. HANSON, *Judge*

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NATURE OF THE CASE

Appellant obtained a Summary Judgment against defendant Ila R. Painter and no appeal was taken therefrom; her husband, intervener Fred L. Painter, sought in this proceeding to obtain a release of a Garnishment served upon garnishee.

DISPOSITION IN THE LOWER COURT

Respondent made a motion to dismiss the Garnishment issued and served upon the Nephi, Utah, branch of First Security Bank of Utah, N.A., and for other appropriate relief. The court ordered the Garnishment released and discharged and awarded respondent judgment against appellant for interest at the legal rate of six percent (6%) per annum on the sum of $723.79 from February 3, 1964, to the date of the Judgment, amounting to the sum of $157.38, and attorney's fees in the sum of $250.00.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment of the lower court which released and discharged the Garnishment, and an order awarding appellant garnishee judgment for the entire joint bank account held by garnishee in the names of defendant Ila R. Painter and her husband, Fred L. Painter, intervener-respondent.

STATEMENT OF FACTS

On or about March 8, 1961, defendants Deon Rosquist, Geraldine Rosquist and Ila R. Painter entered into a property improvement contract with Carpets, Inc., for the sale of certain carpeting, paddings and other floor coverings for the agreed consideration of $887.40, payable in monthly installments of $24.65 each commencing on the 21st day of April, 1961, and continuing on the 21st day of each and every month thereafter until the entire balance was paid in full. (R. 29) The contract was sold

and assigned to appellant on March 8, 1961. (R. 30) The above named defendants made eight partial payments on said contract, which, after deduction of late charges, left an unpaid balance of $703.73.

On June 5, 1962, appellant commenced an action against defendants Deon Rosquist, Geraldine Rosquist and Carpets, Inc., by filing a Complaint. (R. 1-3) Those defendants were personally served with a Summons, but did not answer. (R. 4-6) A Default Judgment was obtained against defendants Deon Rosquist and Geraldine Rosquist on July 5, 1962, for the sum of $741.02, plus attorney's fees in the sum of $234.27, together with interest thereon at the rate of eight percent (8%) per annum until paid. (R. 8) An Amended Complaint was filed on December 31, 1962, to include defendant, Ila R. Painter. (R. 19-22) Defendant Ila R. Painter was personally served with a Summons on January 2, 1963 (R. 22-23) Defendant Ila R. Painter filed an Answer to said Amended Complaint on January 23, 1963. (R. 24) Motion for Summary Judgment against Ila R. Painter and Notice was filed on July 5, 1963. (R. 31-32) A Summary Judgment Against Defendant Ila R. Painter was entered on July 29, 1963, for $741.02, plus attorney's fees in the sum of $234.27 and costs of $15.20, making an aggregate total of $990.49, together with interest thereon at the rate of eight percent (8%) per annum until paid. (R. 33-34)

A Garnishment was issued naming defendants Deon Rosquist, Geraldine Rosquist and Ila R. Painter and served on the Nephi, Utah, branch of First Security Bank

of Utah, N.A., on February 3, 1964. (R. 35) First Security Bank of Utah, N.A., answered the Garnishment stating that they had a joint deposit account in the names of Fred L. Painter and Ila R. Painter with a balance of $723.79 at the time of service of the Garnishment. (R. 36) A Motion for Entry of Garnishee Judgment and Notice was filed by appellant on April 9, 1964. (R. 37) The lower court heard the motion on August 7, 1964, and failed to enter a Garnishee Judgment but charged First Security Bank of Utah, N.A. with a continuing obligation to appellant in the sum of $723.79. Defendant Ila R. Painter died on February 12, 1966.

A Motion for Leave to Intervene and Motion to Dismiss Garnishment was filed by Intervener on August 29, 1967. (R. 40-41) An Order Granting Leave to Intervene in Garnishment Proceedings and Fixing Time for Hearing Motion to Dismiss Garnishment was granted on September 15, 1967 (R. 39) A Memorandum Decision was entered by the lower court on September 15, 1967. (R. 45) The lower court entered Findings of Fact and Conclusions of Law on Motion of Intervener for Judgment in Garnishment Proceedings on September 19, 1967. (R. 57-59) A Judgment in Garnishment Proceedings releasing and discharging the Garnishment was signed on September 19, 1967. (R. 50-51) Appellant filed a Motion to Amend Findings of Fact and Conclusions of Law Submitted by Intervener on September 5, 1967. (R. 46-49) Intervener's Objections to Plaintiff's Motion to Amend Findings and Conclusions was filed on October 10, 1967. (R. 54-55) The lower court on October 16, 1967, entered an Order Deny-

ing Motion to Amend Findings of Fact andConclusions of Law. (R. 56) A Notice of Appeal was filed on October 19, 1967. (R. 66-67)

ARGUMENT

A. THE LOWER COURT ERRED IN RELEASING AND DISCHARGING THE WRIT OF GARNISHMENT ISSUED AND SERVED UPON GARNISHEE.

1. *A Joint Bank Account Held by Garnishee in the Names of Defendant Ila R. Painter and Respondent Is Subject to Garnishment by Appellant as Judgment Creditor of Defendant Ila R. Painter.*

Rule 64 D(a), Utah Rules of Civil Procedure, expressly allows a plaintiff the supplementary remedy of garnishment. Rule 64 D(a) states as follows:

> "The plaintiff, at any time after the filing of the complaint, may have a writ of garnishment issue, and attach the credits, effects, debts, choses in action, money, and other personal property of the defendant in the possession or in the control of any third person, as garnishee, whether the same are due at the time of the service of the writ or are to become due thereafter under the same circumstances and by filing with the court in which the action is pending an affidavit as required by subdivision (a) of Rule 64C, relating to Attachments; provided, that in addition to the requirements of the affidavit for a writ of attachment the affidavit for a writ of garnishment shall state that plaintiff has a good reason to believe and does believe that a particular person, firm or corporation, private or public, has property, money,

goods, chattels, credits or effects in his or its hands or under his or its control belonging to the defendant, or that such person, firm or corporation is indebted to the defendant."

Rule 64 D(b)(2), Utah Rules of Civil Procedure, states that after entry of judgment the clerk may issue a writ of garnishment without the necessity of an affidavit as a condition precedent thereof. Rule 64D(b)(2), in part, states as follows:

> "After the entry of judgment, the clerk of any court from which execution thereon may be issued shall, upon request of the judgment creditor, issue a writ of garnishment and no affidavit or undertaking shall be necessary as a condition therefor."

The inadequacy in many cases of the ordinary means of enforcing a money judgment has led to the very important supplementary remedy of garnishment after judgment. The purpose of the supplementary remedy of garnishment after judgment is well stated in 30 AM. JUR.2d *Executions* § 776 (1967), as follows:

> "The object of supplementary proceedings is not to obtain a new judgment for a debt, but to enable the judgment creditor to enforce the judgment he has already obtained. They are designed to provide a useful, efficacious, and salutary remedy at law, and to afford to a judgment creditor the most complete relief possible in satisfying his judgment. A purpose of the proceedings is to ascertain whether the judgment debtor owns property which can be applied in satisfaction of the judgment. Such proceedings are particularly designed to reach and apply to the satisfaction of the judgment, property of the judgment debtor which is concealed, or which is in the hands of a

third person and which cannot be reached by the ordinary execution."

The garnishment issued and served in these proceedings was in no way wrongful. Appellant was in good faith attempting to ascertain the true and specific interest of defendant Ila R. Painter in any property held by garnishee.

It seems well settled that a joint bank account is subject to garnishment by a judgment creditor of only one of the joint depositors. 30 AM. JUR.2d *Executions* § 800 (1967), states as follows:

> "Most courts are agreed that a joint bank account is garnishable by a judgment creditor of only one of the joint depositors. In this respect, it has been held if, under the terms of the deposit agreement, a check for the amount of the judgment signed by the judgment debtor alone would have been honored, garnishment is available against the joint bank account."

This court has faced the question of whether a creditor can reach a joint bank account held in the names of the debtor and another person and has determined that the joint bank account can be reached by the creditor. *Neill* v. *Royce,* 101 Utah 181, 120 P.2d 327 (1941).

In recognizing that both parties to a joint bank account would attempt to defeat a judgment creditor's rights, the following statement was made in a Note, *Joint Bank Accounts in Utah,* 8 UTAH L. REV. 57, 65 (1962):

> "There is no question that a creditor can reach assets of a debtor held by him in a joint account.

> Because both parties to an account would have a common desire to defeat or minimize the creditor's access to the funds, their version of the present inter vivos interest is likely to contradict his. Thus, a creditor may have difficulty proving that the debtor was the sole contributor, the amount of his contribution, or whether he was a codepositor who had actually been given a present interest or a depositor with only a convenience object in view."

There are other authorities which recognize the right of a creditor to reach a joint bank account. 11 A.L.R. 3rd, 1465, *Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of one of the Joint Depositors* at page 1468 (1967), states as follows:

> "In any event, most courts are agreed that a joint bank account is garnishable at the behest of a creditor of one of the depositors. There are, however, a few cases holding for various reasons, that a joint bank account is not so garnishable, principally in jurisdictions that recognize tenancies by the entirety in personal property and consider that one was created as to the account sought to be garnished."

United States v. *Third Nat. Bank & Trust Co.,* 11 F. Supp. (M.D. Pa. 1953); *Tinsley* v. *Bauer,* 126 Cal.App.2d 724, 271 P.2d 116 (1954); *Leaf* v. *McGowan,* 13 Ill. App. 2d 58, 141 N.E.2d 67 (1957); *Neill* v. *Royce, supra; Park Enterprises, Inc.* v. *Trach,* 233 Minn. 467, 47 N.W.2d 194 (1951), and many other cases hold that a joint bank account may be seized under an attachment or execution by a creditor of one of the joint depositors.

The Utah cases make it clear that where a joint bank account is created, there is a strong presumption that the joint account is valid and will be treated according to the terms of the signature card signed by the parties.

The case of *Tangren* v. *Ingalls,* 12 Utah 2d 388, 367 P.2d 179 (1961), involved a controversy over two joint savings accounts in which the decedent, the original owner of the funds, added the defendant's name to the account ten months prior to his death. The plaintiff, as executor of the estate of the decedent, brought an action to recover the funds. The lower court ruled summarily before trial that the defendant was entitled to the funds. This Court reversed the lower court and stated as follows:

> "Notwithstanding what may have been said therein, we are of the opinion that the rule which is sound in principle and practical in application is that applied in the cases of *Neill* v. *Royce* and *Greener* v. *Greener, supra*: that where there is a written agreement of joint tenancy with right of survivorship, there is a presumption of validity and it will be given effect unless it is successfully attacked for fraud, mistake, incapacity, or other infirmity, or unless it is shown by clear and convincing evidence that the parties intended otherwise; and further, that such rule is applicable whether the parties are living or where death has intervened. Nor would the fact that the original owner may have changed his mind after the creation of the account alter the applicability of that rule." *Tangren* v. *Ingalls, supra,* 12 Utah 2d at 394, 367 P.2d at 184.

The case of *Hanks* v. *Hales*, 17 Utah 2d 344, 411 P.2d 836 (1966), emphasizes the presumption of validity given to a joint bank account. In that case, the plaintiffs, as grandchildren and heirs of the decedent, commenced an action claiming a share of six bank accounts held in joint tenancy by their grandmother and her two daughters, the defendants in the case. The joint bank accounts were created several years prior to the decedent's death and were of the type commonly used, whereby either party could withdraw the funds and providing for the right of survivorship. All of the funds had been deposited by the decedent. Shortly before the decedent's death, the defendants withdrew the funds which they divided between them.

The plaintiffs in that case argued that the decedent did not intend to give the defendants ownership in the funds nor to create a true joint tenancy with right of survivorship. The defendants moved for a dismissal of the action which was granted. On appeal to this Court it was stated as follows:

> "We are thus brought to a consideration of the principal difficulty confronting the plaintiffs: They are trying to defeat the effect of a written instrument. It is endowed with a presumption of validity. Its provisions, including the recited facts of joint tenancy with right of survivorship, must be given effect unless it is successfully attacked on some proper ground; and it can only be overcome by clear and convincing evidence." *Hanks* v. *Hales, supra,* 17 Utah 2d at 346, 411 P.2d at 837.

These cases, when applied to the case at bar, make it patently clear that appellant is entitled to a garnishee

judgment against the joint bank account at the Nephi, Utah, branch of First Security Bank of Utah, N.A., held in the names of defendant Ila R. Painter and respondent. The cited cases make it clear that the presumption of joint tenancy can be overcome only by clear and convincing proof to the contrary. Respondent has not introduced a scintilla of competent evidence to overcome this presmption. That respondent filed an affidavit in the lower court claiming that the funds deposited in the joint checking account were his sole property does not in the least overcome the presumption that a valid joint account was created and that respondent did in fact intend to create a valid legal interest in his wife, defendant Ila R. Painter. Said affidavit is not proper evidence and for the reason that appellant was given no opportunity to cross-examine respondent. The joint bank account in question must be treated as what it truly is — a joint account in which either party at any time could withdraw all of the funds and a joint account in which a creditor of either should be subrogated to those rights.

In a Comment, 60 MICH. L. REV., 972, 982-83 (1962), the following comments were made concerning the presumptions involved in a creditor situation:

> "As long as the intervivos disputes are between the donor and donee themselves, those courts which employ weak presumptions in these cases treat the joint account form as having a relatively minor significance in determining the parties' interests. The donee has little equity in his favor, having given no consideration for the interest he now claims and basing his demand solely on the largesse of the donor. In these circumstances, the

donor is granted a great deal of leeway in challenging and defeating the donee's claims.

"When creditors enter the picture, however, these same courts are less willing to allow the donor to disaffirm the donee's interests to the detriment of creditors who may not know of any particular relationships or agreements between the co-depositors and who may have extended credit on the faith of the donee's apparent interest in the account.

"Thus, courts that would ordinarily deny to the donee any presumption of an intervivos interest or would invoke only a weak presumption do just the opposite in creditor situations. The donee is presumed to have a joint interest in the account and the burden of proof is placed upon the party contesting the donee's interest.

"Those courts which invoke a strong intervivos presumption for the donee in the first instance need not change their presumption to accomplish the same result. The creditor, in both weak and strong presumption jurisdictions, can thus rely on the form of the account to raise a presumption that the donee does have an interest that is subject to attachment and the co-depositors must sustain the burden of proving the donor's contrary intent in order to rebut the presumption."

In 1961 the Savings & Loan Act enacted a statute which makes the terms of a joint account in a savings and loan association conclusive in the absence of fraud or undue influence. Section 7-13-39, Utah Code Annotated (Supp. 1967).

Section 7-3-45, Utah Code Annotated (Supp. 1967), was amended in 1965 to add a paragraph which, in part, states as follows:

> "A bank shall not be required to pay out all or any part of the credit balance in any such joint account pursuant to an attachment, execution, garnishment, judgment, or other legal process issued in any action or proceeding against any one or more but less than all of the persons to whom the account is payable until the bank has been furnished a certified copy of an order of a court of competent jurisdiction determining that such person or persons owned a specified part or all of such credit balance at the time such process was served on the bank."

The only logical construction which can be given to the statute is that prior to the enactment of said statute a bank could pay out the balance of a joint bank account pursuant to an attachment, execution, garnishment, judgment or other legal process issued in any action or proceeding against any one or more but less than all of the persons to whom the account is payable without being furnished a certified copy of an order of a court of competent jurisdiction determining that such person or persons owned a specified part or all of such credit balance at the time such process was served on the bank.

The Garnishment in the case at hand was issued and served prior to the enactment of the statute. As a practical matter no bank would pay out all or any part of the credit balance in a joint account pursuant to a garnishment without a court order, but not until the enactment

of this statute was mention made of portions owned by the parties.

It is of interest that Section 7-3-45, Utah Code Annotated (Supp. 1967), specifically recognizes that a joint bank account is subject to garnishment.

A creditor's right to garnishee a joint bank account for the debt of one of the depositors ceases upon the death of the depositor. *Deforge* v. *Patrick,* 162 Neb. 568, 76 N.W. 2d 733 (1956); *Weaver* v. *Pickard,* 7 Utah 299, 26 Pac. 581 (1891). However, in the case at bar, the Judgment against Mrs. Painter was obtained prior to her death and the Garnishment was issued and served prior to her death.

2. *Appellant Should Be Allowed a Garnishee Judgment on the Entire Joint Bank Account Held in the Names of Defendant Ila R. Painter and Respondent.*

Since by the terms of the joint bank account agreement both defendant Ila R. Painter and respondent are given the unconditional power to withdraw all of the funds from the joint bank account at any time, appellant should be subrogated to the right of defendant Ila R. Painter and therefore be allowed a garnishee judgment on the entire sum of the joint bank account. Any different rule would defraud creditors. The parties to a joint bank account should not be allowed to come in after a judgment has been obtained against one of the parties and contradict the terms of the very agreement which they voluntarily signed.

In *Park Enterprises, Inc.* v. *Trach, supra,* the plaintiff sued the defendant to enforce payment of rent under an oral lease between the parties. The plaintiff in ancillary proceedings garnisheed a joint bank account standing in the name of the defendant and his wife and the wife intervened in the case. The lower court determined that it was impossible to determine on an evidentiary basis the exact amount of funds each had contributed to the account. The lower court concluded that the defendant and his wife should be presumed equal owners and ordered judgment against the garnishee for the amount of the default judgment obtained against the defendant in the main action, but not to exceed one-half of the joint account. The plaintiff appealed and the Minnesota Supreme Court stated as follows:

> "By the deposit agreement here involved, each depositor has given the other depositor in the account complete and absolute authority over it and unconditional power to withdraw all or any part of the account. By the terms of the agreement, the bank is likewise obliged to pay any part or all of the account to either depositor upon demand.
>
> "Since in purpose and legal effect a garnishment proceeding is virtually an action brought by defendant in plaintiff's name against the garnishee, resulting in the subrogation of the plaintiff to the right of the defendant against the garnishee, we have concluded that plaintiff here may not only garnishee this joint account, but also that it would be entitled to recover judgment against the garnishee for the entire amount of the account if its judgment against defendant were sufficient to exhaust it. *Defendant is entitled to withdraw any part or all of the account, and plaintiff, in effect, is subrogated to that right.*" (Emphasis added) *Park*

Enterprises, Inc. v. *Trach, supra,* 233 Minn. at 469, 47 N.W. 2d at 196.

The reasoning of the Minnesota Supreme Court is sound. The defendant could have voluntarily paid anyone, even his creditors, all of the funds in the joint account, and thus an involuntary payment should not be treated inconsistently with those voluntary rights. The Minnesota Supreme Court further stated as follows:

> "Intervener, having agreed to allow defendant to treat the funds in their joint account as his individual property, is in no position to assert that creditors, subrogated to his rights, may not treat them as if they were his individual property. Intervener assumed the risk that defendant would pay these creditors voluntarily, and we fail to see why an involuntary payment stands upon a different footing. If Intervener assumed the risk that her husband would voluntarily honor his debts out of this account, we see no meritorious reason why she should be legally entitled to eschew the risk that he will be compelled to do so. The law should not hedge intervener's risk at the exact instant when the degree of her risk rests upon a point of honor. We shall not assume that intervener took the risk that her husband would honor his debts out of this account merely because she thought he could not be compelled to do so." *Park Enterprises, Inc.* v. *Trach, supra,* 233 Minn. at 469, 47 N.W. 2d at 196-97.

This Court should not encourage respondent to do his bookkeeping in court when by his very contract with First Security Bank of Utah,N.A. he has virtually declared that he does not want to be inconvenienced by any strict accountability as between himself and his wife, defendant Ila R. Painter.

The Minnesota Supreme Court pointed out the fatal effect of allowing a party to the joint account, such as respondent in the case at bar, to come into court and claim that the account is his and exempt from garnishment.

> "Any presumption, whether conclusive or rebuttable, that part or all of these joint accounts are immune from garnishment has the effect of either creating or tending to create a nonstatutory exemption for the parties using them, and any attempt to base the extent of garnishment upon the respective amounts of the account owned by each depositor will compel courts and juries to grope with problems which the depositors themselves have declared to be of no consequence. Let them abide the results which flow from their own declared purposes. *Park Enterprises, Inc.* v. *Trach, supra,* 233 Minn. at 470, 47 N.W. 2d at 197.

This same reasoning was applied in *Empire Fertilizers, Ltd.* v. *Cioci,* 4 D.L.R. 804 (1934), where the Canadian court stated as follows:

> "If the judgment debtor, B. N. Cioci, had given to the judgment creditor a cheque signed by B. N. Cioci alone on the Royal Bank, Jane and Annette Branch, Toronto, for the amount owing by Cioci on the judgment, the bank, on presentment of such cheque for payment, would have had to pay it, on the penalty of an action for damages by B. N. Cioci, against the bank if such cheque had been dishonoured. I see no reason why this judgment creditor of B. N. Cioci should not have recourse to these proceedings to compel such appropriation of these funds as was within the power of Cioci himself at the time of the issue and service of the garnishee summons on the bank . . . ."

Empire Fertilizers, Ltd. v. *Cioci, supra,* 4 D.L.R. at 805.

Either defendant Ila R. Painter or respondent could at any time withdraw all or any part of the funds in the joint bank account and each had unconditional power to utilize moneys in the account. See also section 7-3-45, Utah Code Annotated (Supp. 1967), which states as follows:

> "When a deposit has been made in any bank in the names of two or more persons, payable to any one of such persons or the survivor of them, such deposit or any part thereof or any interest or dividend thereon may be paid to any one of such persons, whether the other or others be living or not, and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made."

Inasmuch as either defendant Ila R. Painter or respondent could have withdrawn the entire amount of the joint checking account, the only logical conclusion is that appellant should be subrogated to the rights of defendant Ila R. Painter, and allowed a garnishee judgment for the entire account.

The case of *Neill* v. *Royce, supra,* stands for the premise that joint bank accounts may be reached by a creditor of one of the joint owners. In that case a divorced wife, in an attempt to obtain unpaid support money from the defendant, obtained a reestraining order against the defendant, restraining him from disposing of his assets. A copy of the restraining order was served upon a bank where the defendant and his second wife

had a joint savings account. The second wife intervened in the action and testified that the funds in the bank account were her separate property, left to her by her deceased first husband and intended for the education of her children by the first marriage.

This Court discussed the status of a creditor's claim on a joint bank account as follows:

> "In the instant case, however, we do not have a suit between a codepositor and the representatives of the deceased codepositor. We have a suit by a third party against the interest of one of the living codepositors. This court having made the written instrument conclusive evidence in the case of the deceased codepositor, *Holt* v. *Bayles, supra,* the question arises what presumption will the law purport to a joint tenancy agreement where both parties to the written agreement are still alive." *Neill* v. *Royce, supra,* 101 Utah at 185, 120 P.2d at 329.

This Court further discussed the presumption:

> "This court does not agree with counsel for the respondent that *Holt* v. *Bayles, supra,* and the conclusive principle therein laid down that 'intention ceases to be an issue and the courts are bound by the agreement' as being controlling under the circumstances of the instant case; nevertheless, there remains a presumption of joint tenenacy where both cotenants are alive. * * * *This presumption, injected by courts of equity since ancient time, continues and can be overcome by the intervener only by clear and convincing proof to the contrary.*" (Emphasis added) *Neill* v. *Royce, supra,* 101 Utah at 188, 120 P.2d at 330-331.

In discussing the evidence introduced and clearly stating that the evidence was not sufficient to overcome the presumption, this Court stated as follows:

> "The only evidence refuting the implied joint savings account in the instant case was that of the testimony of the codepositors to the effect that their purpose in establishing the joint savings account was to take advantage of the survivorship provision, *and that the money was intended to be the sole and separate property of the intervener.* Such proof under the circumstances of this case cannot be termed so clear and convincing as to require the trial court to find in favor of the appellant. To say that it was sufficient would throw open the door to fraud and collusion as between codepositors and third parties. This equity will not do." (Emphasis added) *Neill* v. *Royce, supra,* 101 Utah at 189, 120 P.2d at 331.

B. THE LOWER COURT ERRED IN REACHING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. *Findings of Fact Numbered 1, 2, 6, 7, and 8 Are Not Supported by the Evidence.*

Finding of Fact No. 1 is not supported by the evidence. There is no evidence in the record to indicate that appellant caused to be served upon First Security Bank of Utah N.A. a Writ of Garnishment directed against property of Carpets, Inc.

Finding of Fact No. 2 does not set forth the complete answers of the garnishee, First Security Bank of Utah, N.A. to the interrogatories of the Garnishment served upon it by appellant. That finding deletes that portion of the answer which states as follows:

> "On February 7, 1964, he presented a check drawn by him against said joint account for withdrawal of the full amount remaining in said account and demanded payment of said amount to him. In the absence of proof or knowledge to the contrary we assume that the statement and claim of Fred L. Painter are correct."

The fact that respondent presented a check to the Nephi, Utah, branch of First Security Bank of Utah, N.A., and withdrew the funds in the joint account, is material as to the length of time respondent was without use of the funds and should be made a part of said finding.

Finding of Fact No. 6 should be amended to delete that portion of the finding which states "that no answer or counter-affidavit was filed by the plaintiff or by the garnishee." Said portion of the finding is irrelevant and immaterial to the issues at hand.

Finding of Fact No. 7 should be amended to delete the portion of the finding which states "that the funds deposited in said joint bank account were at the time of deposit the sole property of said intervener and not the property of his wife, Ila R. Painter; that said intervener was at the time of service of said writ of garnishment on said garnishee the true owner of said joint account. . . ."

Rule 52(a), Utah Rules of Civil Procedure, in part, states as follows:

> "In all actions tried upon the facts without a jury . . . the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . . ."

It is a well-accepted rule that written findings of fact and conclusions of law must be separately stated. However, the portion of Finding of Fact No. 7 quoted above is not supported by any evidence and if it were supported by the evidence would be a conclusion of law. There is absolutely no evidence in the record to indicate that Mr. Painter was the true owner of the joint bank account either at the time said deposit was made or at the time of service of the Garnishment.

Finding of Fact No. 7 should be further amended to delete that portion of said finding which states "that by reason of service of said writ of garnishment said intervener has been continuously deprived of funds constituting said joint account." That portion of the finding is controverted by the Answer to Interrogatories on Garnishment filed by the garnishee, wherein it was stated respondent presented a check to garnishee on February 7, 1964, for withdrawal of the full amount remaining in said joint bank account.

Finding of Fact No. 8 should be amended to delete that portion of the finding which states that "such demands have been wrongfully refused. . . ." Said finding is a conclusion of law and is not supported by the evidence in the record.

2. *Conclusions of Law Are Not Supported by the Evidence.*

The Conclusions of Law reached by the lower court state, in part, as follows:

> "From the foregoing facts the court concludes that the intervener, Fred L. Painter, is now and at all times herein mentioned was the owner and entitled to the use of the funds on deposit in said joint bank account at the First Security Bank of Utah, N.A. in the sum of $723.79. . . ."

There is absolutely no competent evidence that respondent is or at any time was the sole owner of the joint bank account. Even if respondent was at one time the owner of said funds, this is immaterial because of the rights vested in defendant Ila R. Painter under the terms of the joint bank account.

CONCLUSION

It is respectfully submitted that the lower court erred in releasing and discharging the joint bank account and in awarding judgment to respondent and against appellant for interest and attorney's fees and the judgment should be reversed. Appellant further submits that it should be awarded a garnishee judgment on the total of the joint bank account because to hold otherwise would act as a fraud upon creditors and in direct contradiction to the terms of the joint bank account agreement signed by defendant Ila R. Painter and respondent.

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